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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Respondent/Plaintiff,

12 v.

13 NICK T. NGUYEN,

14 Movant/Defendant.
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Case No. 2:04-CR-00182-KJD-PAL
2:07-CV-00229-KJD-PAL

ORDER

16 Presently before the Court is Movant's Motion to Vacate, Set Aside, or Correct Sentence
17 (#131) pursuant to 28 U.S.C. § 2255. In accordance with 28 U.S.C. § 2255 ("§ 2255"), the Court
18 finds that a response from the Government is unnecessary, because "the motion and the files and
19 records of the case conclusively show that the prisoner is entitled to no relief."

20 **I. Standard for § 2255**

21 Movant argues first, that he was denied effective assistance of counsel at trial when: (1) his
22 counsel failed to file any trial memoranda or motions *in limine* and failed to offer appropriate
23 evidentiary theories to ensure admissibility of crucial evidence; and (2) his counsel failed to establish
24 specific facts on cross examination of witnesses. Second, Movant argues that his counsel rendered
25 ineffective assistance at sentencing when: (1) his counseled failed to file objections to the
26 presentence investigation report in accordance with Rule 32 of the Federal Rules of Criminal

1 Procedure; (2) his counsel did not object to the district court's upward adjustment of his offense level
2 at sentencing using facts that were not charged in the indictment and found beyond a reasonable
3 doubt by a jury; and (3) by failing to argue that the sentencing judge did not have discretion based
4 upon his reasonable belief.

5 Since Movant failed to raise any of these claims on direct appeal, a § 2255 motion is only
6 available if the movant establishes either "cause" for the waiver and "actual prejudice" resulting from
7 the alleged violation or "actual innocence." See Bousley v. United States, 523 U.S. 614, 622 (1998);
8 United States v. Frady, 456 U.S. 152, 167 (1982).

9 A § 2255 movant can ordinarily establish "cause" by demonstrating that counsel rendered
10 ineffective assistance. See Coleman v. Thompson, 501 U.S. 722, 753-54 (1991). However, attorney
11 error short of constitutional ineffectiveness does not constitute "cause" notwithstanding that the error
12 was due to ignorance, inadvertence or deliberate strategy. See id. at 752.

13 II. Ineffective Assistance of Counsel at Trial

14 Movant asserts that his counsel, at trial, rendered ineffective assistance by failing to file any
15 trial memoranda, motions *in limine*, and failed to ensure the admissibility of crucial evidence.
16 However, Movant has only made vague assertions regarding the failure of his trial counsel to file trial
17 memoranda and motions *in limine*. Movant has not specified how this failure prejudiced his defense.
18 See Strickland v. Washington, 466 U.S. 668, 687 (1984). Since Movant has not demonstrated which
19 particular motions *in limine* his counsel should have made, the Court cannot conclude that if
20 counsel's performance was deficient that it prejudiced Movant's defense or that the error was one of
21 constitutional magnitude.

22 Movant also argues that his counsel failed to establish the admissibility of crucial evidence.
23 On direct appeal, Movant argued that the Court inappropriately excluded three areas of expert
24 testimony. The Court of Appeals affirmed the district court's ruling on all three areas of expert
25 testimony. See Memorandum, Docket #121. Since review under § 2255 is not available to claims
26 that have been previously rejected on their merits on direct appeal, this claim is moot. See Kaufman

1 v. United States, 394 U.S. 217, 227 n.8 (1969), overruled on other grounds by Stone v. Powell, 428
 2 U.S. 465 (1976); Daniels v. United States, 26 F.3d 706, 711-712 (7th Cir. 1994); Underwood v.
 3 United States, 15 F.3d 16, 18 (2d Cir. 1993).

4 Finally, Movant argues that counsel was ineffective for failing to establish on cross
 5 examination that his patients were confined to bed and medicated when he treated them rendering
 6 their testimony regarding the lack of pain moot. However, given the testimony presented in court,
 7 Movant's counsel's able representation and cross examination, the Court cannot conclude that an
 8 error of constitutional magnitude occurred infecting his trial. Movant is merely wishing for a
 9 different result and has not demonstrated constitutional errors or actual innocence.

10 III. Ineffective Assistance at Sentencing

11 Movant argues that counsel failed to properly object to the Presentence Investigation Report
 12 ("PSI") in accordance with Rule 32. However, Movant's counsel did properly object to the PSI. See
 13 Defendant Nick Nguyen's Objections to Presentence Report and Position Re: Sentencing, Docket
 14 #86. Furthermore, the PSI clearly reflects that Movant's counsel did object to an upward
 15 enhancement based on a loss amount not contained in the indictment and not found by a jury based
 16 on a reasonable doubt. See Docket #86, p. 19. Therefore, the Court denies Movant's § 2255 motion
 17 based upon these grounds.

18 Finally, Movant argues that his counsel was ineffective by failing to argue that the district
 19 court was misguided in its position that the Sentencing guidelines are advisory and that the judge had
 20 discretion based on what he believed was reasonable. Movant relies on the recent Supreme Court
 21 case Cunningham v. California, 127 S. Ct. 856 (2007) which held that California's determinate
 22 sentencing law which authorized a judge, not jury, to find facts exposing defendant to elevated upper
 23 term sentence violated defendant's right to a trial by jury. However, Movant is misguided in his
 24 belief that Cunningham casts doubt upon the advisory nature of the federal sentencing guidelines and
 25 the use of the guidelines in determining whether a sentence is reasonable. Therefore, the Court
 26 denies Movant's motion under § 2255 and denies his request to hold his motion in abeyance.

1 IV. Conclusion

2 Accordingly, IT IS HEREBY ORDERED that Movant's Motion to Vacate, Set Aside, or
3 Correct Sentence (#131) pursuant to 28 U.S.C. § 2255 is **DENIED**.

4 DATED this 7th day of May 2007.

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8 Kent J. Dawson
United States District Judge
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